

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STEPHEN MCQUENNIE,

Plaintiff,

v.

WELLS FARGO INSTITUTIONAL
RETIREMENT SERVICES, et al.,

Defendants.

Case No. 1:22-cv-00557-JLT-SKO

FINDINGS AND RECOMMENDATION
THAT PLAINTIFF'S FIRST AMENDED
COMPLAINT BE DISMISSED WITHOUT
LEAVE TO AMEND

(Doc. 14)

21-DAY DEADLINE

On May 10, 2022, Plaintiff Stephen McQuennie, proceeding *pro se* and *in forma pauperis*, filed a complaint against Defendants Wells Fargo Institutional Retirement Services (“Wells Fargo”) and Principal Financial Group (“Principal”). (Doc. 1). On August 12, 2022, the undersigned screened the complaint, found that it failed to state any cognizable claims, and granted Plaintiff thirty days leave to file an amended complaint curing the pleading deficiencies identified in the order. (Doc. 5.)

On September 2, 2022, Plaintiff filed a document titled “First Amended Complaint,” but the substance of the document appeared to indicate that he wished to stand on his initial complaint. (See Doc. 6 at 2 (Plaintiff stating, “I do believe however, that my case has merit as stated in [t]he original complaint . . . ”)). Given the lack of clarity as to Plaintiff’s desired course of action, the undersigned ordered Plaintiff to file either (1) an amended complaint, which would be complete in

1 itself without reference to the prior pleading; or (2) a statement that Plaintiff sought to stand on the
2 initial complaint and have it reviewed by the presiding district judge. (Docs. 7–8.) Plaintiff did
3 not file either document within the applicable time frame, nor did he request an extension of time
4 in which to do so.

5 On October 18, 2022, an order issued for Plaintiff to show cause (“OSC”) within twenty-
6 one days as to why the action should not be dismissed for his failure to comply with the Court’s
7 screening order. (Doc. 9.) On November 17, 2022, Plaintiff filed a notice acknowledging his
8 failure to take action by the deadline set forth in the OSC. (Doc. 10 at 1–3.) In his notice, Plaintiff
9 stated his intention “[t]o reinstate what was said in the complaint earlier about Wells Fargo Bank.”
10 (*Id.* at 6.) He also filed motions seeking leave of court to dismiss Principal (Doc. 11) and to add
11 Wells Fargo Bank as a defendant (Doc. 12). (*See also* Doc. 10 at 5–8.)

12 On November 21, 2022, for good cause shown, the undersigned discharged the OSC and
13 granted Plaintiff “one last and final” opportunity to file an amended complaint. (Doc. 13 at 3.)
14 Plaintiff was advised that Federal Rule of Civil Procedure 15 was the proper mechanism by which
15 he could dismiss or add parties to the action, and that he was free to omit Principal from, and add
16 Wells Fargo to, his first amended complaint. (*Id.* at 2.) The two motions Plaintiff filed (Docs. 11
17 & 12) were denied. (Doc. 13 at 3.) Plaintiff was cautioned that his first amended complaint needed
18 to cure the deficiencies identified by the Court in its August 12, 2022, screening order, and that
19 failure to comply with the Court’s order would result in a recommendation that this action be
20 dismissed in its entirety. (*Id.*) On December 16, 2022, Plaintiff filed his first amended complaint,
21 naming Wells Fargo “[a]nd Ms. Helena,” as well as Principal, as Defendants. (Doc. 14.)

22 After screening Plaintiff’s first amended complaint, the undersigned finds that despite the
23 explicit recitation of the deficiencies of the original complaint, Plaintiff’s allegations are
24 insufficient to plead a cognizable claim. Furthermore, the amended complaint fails to set forth any
25 cognizable claims over which this Court may assert jurisdiction. Accordingly, the undersigned
26 RECOMMENDS that Plaintiff’s first amended complaint be DISMISSED without prejudice,
27 without leave to amend, for failure to state a claim upon which relief may be granted as to two of
28 the Defendants and for lack of jurisdiction as to all the Defendants.

I. SCREENING REQUIREMENT

In cases where the plaintiff is proceeding *in forma pauperis*, the Court is required to screen each case and shall dismiss the case at any time if the Court determines that the allegation of poverty is untrue, or that the action or appeal is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2); *see also Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (district court has discretion to dismiss *in forma pauperis* complaint); *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998) (affirming *sua sponte* dismissal for failure to state a claim). If the Court determines that a complaint fails to state a claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be cured by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (*en banc*).

In determining whether a complaint fails to state a claim, the Court uses the same pleading standard used under Federal Rule of Civil Procedure 8(a). A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A complaint may be dismissed as a matter of law for failure to state a claim based on (1) the lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). The plaintiff must allege a minimum factual and legal basis for each claim that is sufficient to give each defendant fair notice of what the plaintiff’s claims are and the grounds upon which they rest. *See, e.g., Brazil v. U.S. Dep’t of Navy*, 66 F.3d 193, 199 (9th Cir. 1995); *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

24 In reviewing a *pro se* complaint, the Court is to liberally construe the pleadings and accept
25 as true all factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94
26 (2007). The Court, however, need not accept a plaintiff's legal conclusions as true. *Iqbal*, 556 U.S.
27 at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it
28 'stops short of the line between possibility and plausibility of "entitlement to relief.'"'" *Id.* (quoting

1 *Twombly*, 550 U.S. at 557).

2 **II. DISCUSSION**

3 **A. Summary of the First Screening Order**

4 Plaintiff's initial complaint named Wells Fargo and Principal as Defendants and alleged
5 violations of the Federal Reserve Act, 12 U.S.C. §§ 265–66, the Federal Deposit Insurance Act,
6 12 U.S.C. §§ 1811–1832, the Employee Retirement Income Security Act of 1974 ("ERISA"), 29
7 U.S.C. §§ 1001 *et seq.*, and the Dodd-Frank Wall Street Reform and Consumer Protection Act
8 ("Dodd-Frank Act"), 12 U.S.C. §§ 5301 *et seq.* (Doc. 1 at 9.) As summarized by the first
9 screening order (Doc. 5 at 3–5), Plaintiff's claims were based on distinct events involving his
10 retirement account and personal checking account. (*Id.* at 10–16.)

11 The undersigned found that the complaint failed to state any cognizable claims, provided
12 Plaintiff with legal standards applicable to his claims, and granted Plaintiff an opportunity to file
13 an amended complaint to correct the identified deficiencies. (Doc. 5 at 5.) The undersigned
14 described how Plaintiff articulated his grievances against Wells Fargo regarding its handling of
15 the purportedly fraudulent transactions, but he failed to identify any legal bases for his suit
16 against Wells Fargo. (*Id.* at 6.) The undersigned found that these allegations, as pleaded, were
17 insufficient and qualified as a "shotgun pleading" because they failed to provide Defendants with
18 "fair notice" of the claims against which they must defend and the facts and legal theories that
19 gave rise to his claims. (*Id.*) Plaintiff was granted leave to amend his complaint and to "set forth
20 his claims more clearly." (*Id.*) Plaintiff was advised that in any amended complaint, he "**must**
21 **clearly state which claim is against which defendant and the facts that support and show**
22 **that the specific defendant committed the violation asserted as the legal basis for the claim.**"
23 (*Id.* (citing Fed. R. Civ. P. 8(a)).)

24 Plaintiff was provided with the legal standards that might be relevant to his action in the
25 event he sought to amend the complaint. (Doc. 5 at 6–8.) The undersigned first described the
26 elements and legal principles applicable to claims brought under ERISA for breach of fiduciary
27 duty. (*Id.* at 7.) The undersigned advised Plaintiff that his complaint, as pleaded, did not contain
28 sufficient factual allegations to support an ERISA claim, and that in any amended complaint, he

1 must allege facts demonstrating that Defendants had either discretionary authority or control over
 2 the management or administration of his retirement plan. (*Id.*) The undersigned noted that the
 3 remaining legal provisions identified by Plaintiff—the Federal Reserve Act, the Federal Deposit
 4 Insurance Act, and the Dodd-Frank Act—do not create a private right of action. (*Id.* at 7–8.)

5 In granting Plaintiff leave to amend, the undersigned cautioned Plaintiff that if he chose to
 6 amend his complaint, “he must clearly state in the amended complaint his legal claims, identify
 7 which defendant the claim is against, and allege facts that support and show that the specific
 8 defendant engaged in conduct asserted as the legal basis for the claim.” (Doc. 5 at 9.)

9 **B. Summary of the First Amended Complaint**

10 Plaintiff’s first amended complaint is a three-page typed document titled “FIRST
 11 AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 15
 12 AND THE ABOVE CAPTIONED ACTION: Regarding my personal accounts at Wells Fargo
 13 Bank: Court Document B. Page 4.” (Doc. 14 at 1.) The amended complaint appears to be
 14 comprised of several factual allegations with no citations or references to any legal statutes or
 15 provisions. Plaintiff alleges “[i]t is clear, [t]he Court understood,” that \$2,002.50 was taken from
 16 his account without his knowledge or consent while it was in the custody of Wells Fargo Bank.
 17 (Doc. 14 at 1–2.) Plaintiff alleges “[i]t is also clear that Wells Fargo has not produce[d] a single
 18 piece of evidence to justify holding” his \$2,002.50. (*Id.* at 2.) Plaintiff contends his accounts at
 19 Wells Fargo have been closed since the incident “and will remain closed.” (*Id.*) He states he is
 20 seeking the return of his \$2,002.50 “plus reasonable interest and applied penalty,” that “Wells Fargo
 21 Bank should be prohibited from charging any fee or further unnecessary delay,” and Exhibits 10
 22 and 11¹ “demand[] that this be done expeditiously.” (*Id.*)

23 Plaintiff further alleges that, regarding his “401K Union Plan,” it is clear the Court
 24 understood that “lies and deceptions” were used by “Wells Fargo Enrollment Representatives” to

25 ¹ “Exhibits 10 and 11” presumably refer to the two exhibits attached to the document titled “Notice to the Court”
 26 filed by Plaintiff on November 17, 2022. (See Doc. 10 at 9–11.) In the first screening order, however, the
 27 undersigned advised Plaintiff that any amended complaint would supersede the original complaint, *Lacey v.*
Maricopa Cty., 693 F.3d. 896, 907 n.1 (9th Cir. 2012) (en banc), must be complete in itself without reference to the
 28 prior pleading, E.D. Cal. L.R. 220, and should be clearly and boldly titled “First Amended Complaint.” (Doc. 5 at 9.) Accordingly, the undersigned declines to consider these two exhibits as part of the operative pleading before the Court for screening.

1 get him to transfer \$14,000 “plus dollars to them.” (Doc. 14 at 2.) Plaintiff states this “was followed
2 by mismanagement, more lies, and a lack of accountability,” which was “tantamount to putting an
3 obstacle in front of a blind person,” and “lying to regulators such as FINRA is definitely a crime.”
4 (*Id.* at 2–3.) The first amended complaint concludes with the following paragraph:

5 In closing, I trust this will meet the standard The Court is
6 seeking because this is the best I can do. I would also like to add:
7 There is no place in the U. S. A., where it is ok for John is allowed
8 to steal from Mary because Jane stole from John, and that is what a
9 decision maker at Wells Fargo is doing to me while he is comfortable
with his wonderful Wells Fargo salary. Who can access Wells Fargo
Banking System to establish bank account (s), but a Wells Fargo
employee? That one thing is clear to me. Finally, we are told
everyone has equal justice under the Law, but if the Law cannot be
accessed for the lack of wealth or education, is there equal Justice?

10 (Doc. 14 at 3.)

11 **C. Plaintiff’s First Amended Complaint Should be Dismissed for Failure to
12 State a Claim as to “Ms. Helena” and Principal and for Lack of Jurisdiction
as to All Three Defendants**

13 **1. Failure to State a Claim as to “Ms. Helena” and Principal**

14 Even liberally construed, Plaintiff’s first amended complaint does not “contain sufficient
15 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’” as to “Ms.
16 Helena” and Principal. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). To survive
17 screening, Plaintiff’s claims, as pleaded, must be facially plausible, which requires sufficient factual
18 detail to allow the Court to reasonably infer that each named Defendant is liable for the misconduct
19 alleged. *Iqbal*, 556 U.S. at 678; *accord Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th
20 Cir. 2009).

21 The amended complaint must contain sufficient factual allegations to give Defendants fair
22 notice of each claim and the grounds upon which it rests. *Twombly*, 550 U.S. at 555. As explained
23 in the first screening order (Doc. 5 at 6), “[a] [s]hotgun pleading occurs when one party pleads that
24 multiple parties did an act, without identifying which party did what specifically; or when one party
25 pleads multiple claims, and does not identify which specific facts are allocated to which claim.”
26 *Courtney v. Hous. Auth. of the Cty. of Kings*, No. 1:20-cv-01296-NONE-SKO, 2021 WL 168285,
27 at *4 (E.D. Cal. Jan. 19, 2021). “This violates Rule 10 of the Federal Rules of Civil Procedure,
28 which requires that ‘[a] party must state its claims or defenses in numbered paragraphs, each limited

1 as far as practicable to a single set of circumstances,’ and Rule 8.” *Id.*

2 Here, the operative pleading, even after amendment, again constitutes an impermissible
3 “shotgun” pleading and fails to comply with Rules 8 and 10. As set forth above, in the amended
4 complaint, Plaintiff alleges money was taken from his Wells Fargo account without his knowledge
5 or consent, and that his account has since been closed. (Doc. 14 at 1–2.) He seeks the return of his
6 money, along with interest and a penalty, and that Wells Fargo be prohibited from charging
7 additional fees or causing further delay. (*Id.* at 2.) Plaintiff also alleges that lies, deception, and
8 mismanagement were involved in him transferring about \$14,000 to “Wells Fargo Enrollment
9 Representatives” in relation to his “401K Union Plan.” (*Id.* at 2–3.)

10 Although the Federal Rules use a flexible pleading policy, Plaintiff is required to give fair
11 notice to *each* Defendant as to the bases of his claims and must allege facts that support the elements
12 of the claims plainly and succinctly. *See Twombly*, 550 U.S. at 555; *Courtney*, 2021 WL 168285,
13 at *4. He fails to do so. Wells Fargo is the only Defendant described in the factual allegations
14 contained in the amended complaint. Liberally construing the operative pleading and accepting as
15 true all factual allegations contained in the amended complaint, as the Court must at this stage of
16 the proceedings, Plaintiff has adequately stated a claim against Wells Fargo. Other than in the
17 address blocks, however, there is no mention of “Ms. Helena” or Principal, aside from a vague
18 reference to Plaintiff’s “401K Union Plan.” (Doc. 14 at 2.) Ultimately, it is unclear which factual
19 allegations in the amended complaint, if any, pertain to Principal and “Ms. Helena.” Accordingly,
20 the undersigned finds that Plaintiff fails to state a claim as to “Ms. Helena” and Principal.

21 Although Plaintiff has stated a claim against Wells Fargo, the undersigned finds that
22 Plaintiff’s amended complaint should be dismissed for lack of subject matter jurisdiction, as
23 discussed below.

24 **2. Failure to Plead a Cognizable Federal Claims as to All Defendants**

25 a. Legal Standard

26 Jurisdiction is a threshold inquiry that must precede the adjudication of any case before the
27 district court. *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376,
28 1380 (9th Cir. 1988). Federal courts are courts of limited jurisdiction and may adjudicate only

1 those cases authorized by federal law. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377
2 (1994); *Willy v. Coastal Corp.*, 503 U.S. 131, 136–37 (1992). “Federal courts are presumed to lack
3 jurisdiction, ‘unless the contrary appears affirmatively from the record.’” *Casey v. Lewis*, 4 F.3d
4 1516, 1519 (9th Cir. 1993) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546
5 (1986)).

6 Lack of subject matter jurisdiction may be raised by the court at any time during the
7 proceedings. *Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 594–95 (9th Cir.
8 1996). A federal court “ha[s] an independent obligation to address sua sponte whether [it] has
9 subject-matter jurisdiction.” *Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). It is the
10 obligation of the district court “to be alert to jurisdictional requirements.” *Grupo Dataflux v. Atlas*
11 *Global Group, L.P.*, 541 U.S. 567, 593 (2004). Without jurisdiction, the district court cannot decide
12 the merits of a case or order any relief. *See Morongo*, 858 F.2d at 1380.

13 The basic federal jurisdiction statutes are 28 U.S.C. §§ 1331 and 1332, which confer
14 “federal question” and “diversity” jurisdiction, respectively. Federal jurisdiction may also be
15 conferred by federal statutes regulating specific subject matter. “[T]he existence of federal
16 jurisdiction depends solely on the plaintiff’s claims for relief and not on anticipated defenses to
17 those claims.” *ARCO Envtl. Remediation, LLC v. Dep’t of Health & Envtl. Quality*, 213 F.3d 1108,
18 1113 (9th Cir. 2000).

19 Pursuant to 28 U.S.C. § 1331, federal district courts have federal question jurisdiction over
20 “all civil actions arising under the Constitution, laws, or treaties of the United States.” “A case
21 ‘arises under’ federal law either where federal law creates the cause of action or ‘where the
22 vindication of a right under state law necessarily turn[s] on some construction of federal law.’”
23 *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088–89 (9th Cir. 2002) (quoting
24 *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8–9 (1983)). The presence
25 or absence of federal question jurisdiction is governed by the “‘well-pleaded complaint rule.’”
26 *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under this rule, “federal jurisdiction exists
27 only when a federal question is presented on the face of the plaintiff’s properly
28 pleaded complaint.” *Id.*

Pursuant to 28 U.S.C. § 1332, district courts have diversity jurisdiction only over “all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs,” and the action is between: (1) “citizens of different States;” (2) “citizens of a State and citizens or subjects of a foreign state;” (3) “citizens of different States and in which citizens or subjects of a foreign state are additional parties;” and (4) “a foreign state . . . as plaintiff and citizens of a State or of different States.” “To demonstrate citizenship for diversity purposes a party must (a) be a citizen of the United States, and (b) be domiciled in a state of the United States.” *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir. 1986). “Diversity jurisdiction requires complete diversity between the parties—each defendant must be a citizen of a different state from each plaintiff.” *In re Digimarc Corp. Derivative Litigation*, 549 F.3d 1223, 1234 (9th Cir. 2008).

b. Analysis

Here, Plaintiff’s amended complaint presents no allegations related to jurisdiction. As for federal question jurisdiction, Plaintiff appears to have abandoned the federal claims identified in his original complaint. At best, the amended complaint alleges state law claims such as breach of fiduciary duty, breach of contract, negligence, and/or theft. Such allegations fall short of establishing a cause of action “arising under” federal law necessary to proceed in federal court.

As for diversity jurisdiction, the address blocks in Plaintiff’s complaint indicate that he is a resident of California, that Wells Fargo and “Ms. Helena” are residents of North Carolina, and that Principal is a resident of Iowa. (See Doc. 14 at 1.) Liberally construed, these allegations establish diversity of citizenship. Regarding the amount in controversy, however, Plaintiff’s amended complaint pleads that \$2,002.50 was taken from his account and held by Wells Fargo, and he seeks the return of his \$2,002.50 “plus reasonable interest and applied penalty.” (Doc. 14 at 1–2.) Regarding his “401K Union Plan,” Plaintiff alleges Wells Fargo representatives used deceptive tactics to cause him to transfer \$14,000 “plus dollars” to them. (*Id.* at 2.) Even liberally construed, these allegations fail to meet the \$75,000 threshold and do not appear to be wholly substantiated.

Accordingly, because Plaintiff has not articulated any cognizable claim over which this Court may assert jurisdiction, dismissal is recommended.

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1 **D. Leave to Amend Will Not Be Recommended**

2 When dismissing a complaint, the Ninth Circuit has stated that “leave to amend should be
 3 granted unless the district court ‘determines that the pleading could not possibly be cured by the
 4 allegation of other facts.’” *Bly-Magee v. Cal.*, 236 F.3d 1014, 1019 (9th Cir. 2001). Where the
 5 Court has already granted a plaintiff leave to amend a complaint, however, the Court’s discretion
 6 in determining whether to allow additional opportunities to amend is ““particularly broad.”” *Miller*
 7 *v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004); *accord Sateriale v. R.J. Reynolds*
 8 *Tobacco Co.*, 697 F.3d 777, 794 (9th Cir. 2012).

9 Further amendment is not appropriate in this case. When dismissing the prior complaint,
 10 the undersigned advised Plaintiff that any amended complaint must clearly state “his legal claims,
 11 identify which defendant the claim is against, and allege facts that support and show that the specific
 12 defendant engaged in conduct asserted as the legal basis for the claim.” (Doc. 5 at 9.) In the Court’s
 13 order discharging the OSC, the undersigned cautioned Plaintiff that his first amended complaint
 14 needed to cure the deficiencies identified by the Court in its first screening order, and that failure
 15 to comply with the Court’s order would result in a recommendation that this action be dismissed in
 16 its entirety. (Doc. 13 at 3.)

17 Plaintiff has demonstrated that he is unable to marshal facts sufficient to constitute a
 18 cognizable federal claim and that the addition of more detailed factual allegations or revision of
 19 Plaintiff’s claims will not cure the defects of his amended complaint with regard to Principal and
 20 Ms. Helena. Plaintiff has also failed to plead facts invoking this Court’s jurisdiction as to any of
 21 the Defendants. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996) (“A party invoking the
 22 federal court’s jurisdiction has the burden of proving the actual existence of subject matter
 23 jurisdiction.”). Accordingly, granting further leave to amend as to any of the Defendants would be
 24 futile, and the action should be dismissed without prejudice. *See, e.g., Jones v. Pope*, Case No.
 25 1:22-cv-01232-JLT-SKO, 2022 WL 17343871, at *1 (E.D. Cal. Nov. 30, 2022) (dismissing
 26 complaint without prejudice and without leave to amend for failure to state a claim and for lack of
 27 jurisdiction); *Cal. Architectural Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1472 (9th Cir.
 28 1987) (“Valid reasons for denying leave to amend include undue delay, bad faith, prejudice, and

1 futility.”).

2 **III. CONCLUSION AND RECOMMENDATION**

3 Based on the foregoing, it is HEREBY RECOMMENDED that this action be dismissed
4 without prejudice and without leave to amend.

5 These Findings and Recommendation will be submitted to the United States District Judge
6 assigned to the case pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. **Within**
7 **twenty-one (21) days after being served with these Findings and Recommendation,** Plaintiff
8 may file written objections with the Court. The document should be captioned “Objections to
9 Magistrate Judge’s Findings and Recommendation.” The district judge will review the magistrate
10 judge’s findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). Plaintiff is advised
11 that failure to file objections within the specified time may result in the waiver of rights on appeal.
12 *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391,
13 1394 (9th Cir. 1991)).

14
15 IT IS SO ORDERED.

16 Dated: April 28, 2023

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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